

September 3, 2019

Via FOIA.gov

Douglas Hibbard
Chief, Initial Request Staff
Office of Information Policy
U.S. Department of Justice
1425 New York Avenue, N.W., Suite 11050
Washington, DC 20530-0001
Tel: (202) 514-3642

Re: Freedom of Information Act Request for Expedited Production of Records

Dear Mr. Hibbard:

Pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, and the U.S. Department of Justice’s (“DOJ”) implementing regulations, 28 C.F.R. §§ 16.1–16.11, we request expedited production of the following records concerning the White House’s involvement, if any, in the investigation and potential prosecution of former Federal Bureau of Investigations (“FBI”) Deputy Director Andrew G. McCabe.

1. Records of, reflecting, or referencing any communications between President Trump and any individual(s) at the Department of Justice regarding Andrew McCabe, which records also contain any one of the following words (or permutations thereof): prosecute, indict, criminal, charge, punish, prison, jail, lock up, convict, grand jury.
2. Records of, reflecting, or referencing any communications between White House personnel and any individual(s) at the Department of Justice regarding Andrew McCabe, which records also contain any one of the following words (or permutations thereof): prosecute, indict, criminal, charge, punish, prison, jail, lock up, convict, grand jury.
3. Any emails, memorandum, and other written correspondence from, to, or copying Attorney General William Barr and/or Deputy Attorney General Jeffrey Rosen referencing (a) “Trump,” “President,” “POTUS,” and/or “White House” and (b) “McCabe,” which correspondence also contains any one of the following words (or permutations thereof): prosecute, indict, criminal, charge, punish, prison, jail, lock up, convict, grand jury.

This request is for documents dating from March 16, 2018, to the present. For purposes of this request, “records” includes, but is not limited to: agendas, manifests, calendars, schedules, notes, and any prepared documentation for meetings, calls, teleconferences, or other discussions responsive to our request; voicemails; texts; images; videos; audio recordings; e-mails; e-mail attachments; talking points; faxes; training documents and guides; tables of contents and contents of binders; documents pertaining to instruction and coordination of couriers; and any other materials.

Where a record contains information that falls into one or more of the categories described above, we seek the entirety of that document. If processing the entirety of a given document would be unusually burdensome, we ask that you give us an opportunity to narrow our request.

If you make a determination that any responsive record, or any segment within a record is exempt from disclosure, we ask that you provide an index of those records at the time you transmit all other responsive records. In the index, please include a description of the record and the reason for exclusion with respect to each individual exempt record or exempt portion of a record, as provided by *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 977 (1974). When you deem a portion of a record exempt, we ask that the remainder of the record to be provided, as required by 5 U.S.C. §§ 552(a)(8)(A)(ii) & 552(b).

We also ask that you provide responsive electronic records in their native file format or a generally accessible electronic format (e.g., for tabular data, XLS or CSV). See 5 U.S.C. § 552(a)(3)(B). Alternatively, please provide the records electronically in a text-searchable, static-image format (e.g., PDF), in the best image quality in the agency's possession, and in separate, Bates-stamped files.

Request for Expedited Processing

We request that you expedite the processing of this request pursuant to 5 U.S.C. § 552(a)(6)(E) and 28 C.F.R. § 16.5(e). This request meets the criteria for expedited processing both because (1) there is “[a]n urgency to inform the public about an actual or alleged federal government activity” and the request is “made by a person who is primarily engaged in disseminating information”; and (2) the request concerns “[a] matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity that affect public confidence.” 28 C.F.R. § 16.5(e)(1)(ii), (iv). In addition to the reasons laid out below, we incorporate the paragraphs of the Background section of this request as if fully set forth herein and we certify that both the Background section and this section are true and correct to the best of our knowledge and belief. See 5 U.S.C. § 552(a)(6)(E)(vi); 28 C.F.R. § 16.5(e)(3).

1. Urgency to Inform the Public

This request is entitled to expedited processing under 28 C.F.R. § 16.5(e)(ii) and 5 U.S.C. § 552(a)(6)(E)(v)(II) because these records are urgently needed to inform the public about actual or alleged government activity, and we are primarily engaged in disseminating information to the public.

The requested records relate to President Trump’s and/or the White House’s possible interference into the DOJ’s criminal investigation and prosecution of McCabe. Ever since McCabe began leading the FBI’s investigation into links between the Russian government and President Trump’s 2016 campaign, the President has launched a series of attacks on McCabe.¹ It

¹ See Complaint ¶¶ 47–104, *McCabe v. Barr*, No. 19-cv-2399 (D.D.C. August 8, 2019), ECF No. 1 (hereinafter “McCabe Complaint”), available at <https://int.nyt.com/data/documenthelper/1618-andrew-mccabe-s-civil-lawsuit/3be1ef9625dfdece717f/optimized/full.pdf#page=1>. The series of attacks are also listed in Lawfare’s recent

is highly likely that prosecutors will decide whether to indict McCabe within days.² Although the Justice Department inspector general has found fault in certain conduct by McCabe,³ an “indictment of a former top F.B.I. official is extremely rare,” particularly for this type of misconduct.⁴ Any direct involvement in either the investigation or the decision whether to indict McCabe would violate longstanding DOJ norms,⁵ the White House’s own policy,⁶ and raise serious constitutional questions,⁷ about which it is urgently necessary to inform the public. President Trump’s attacks on McCabe and the government’s investigation of McCabe have been the subject of sustained and ongoing news coverage.⁸

Requesters are primarily engaged in disseminating information to the public and plan to disseminate records responsive to this request to the public. To qualify as a “person primarily engaged in disseminating information to the public,” a requester need only demonstrate that “information dissemination be the main and not merely an incidental activity of the requestor.” *Protect Democracy Project, Inc. v. U.S. Dep’t of Def.*, 263 F. Supp. 3d 293, 298

article, Benjamin Wittes, *Thoughts on the Impending Prosecution of Andrew McCabe*, Lawfare (Aug. 27, 2019), <https://www.lawfareblog.com/thoughts-impending-prosecution-andrew-mccabe>.

² Adam Goldman, *Prosecutors Near Decision on Whether to Seek an Andrew McCabe Indictment*, N.Y. Times, Aug. 26, 2019, <https://www.nytimes.com/2019/08/26/us/politics/andrew-mccabe-indictment-decision.html>; Benjamin Wittes, *Thoughts on the Impending Prosecution of Andrew McCabe*, Lawfare (Aug. 27, 2019), <https://www.lawfareblog.com/thoughts-impending-prosecution-andrew-mccabe>.

³ Office of Inspector General, U.S. Department of Justice, *A Report of Investigation of Certain Allegations Relating to Former FBI Deputy Director Andrew McCabe* (Feb. 2018).

⁴ Adam Goldman, *Prosecutors Near Decision on Whether to Seek an Andrew McCabe Indictment*, N.Y. Times, Aug. 26, 2019, <https://www.nytimes.com/2019/08/26/us/politics/andrew-mccabe-indictment-decision.html>; see also Benjamin Wittes, *Thoughts on the Impending Prosecution of Andrew McCabe*, Lawfare (Aug. 27, 2019), <https://www.lawfareblog.com/thoughts-impending-prosecution-andrew-mccabe>.

⁵ See *Protecting Independent Law Enforcement*, <https://protectdemocracy.org/protecting-independent-law-enforcement/> (last visited Aug. 29, 2019).

⁶ See Mem. from Donald F. McGahn II, Counsel to the President, re: Communications Restrictions with Personnel at the Department of Justice (Jan. 27, 2017), available at <https://www.politico.com/f/?id=0000015a-dde8-d23c-a7ff-dfe4d530000>.

⁷ See *Hartman v. Moore*, 547 U.S. 250, 256 (2006) (“[T]he law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions, including criminal prosecutions, for speaking out”); *United States v. Armstrong*, 517 U.S. 456 (1996); *United States v. Batchelder*, 442 U.S. 114 (1979); *Protecting Independent Law Enforcement*, <https://protectdemocracy.org/protecting-independent-law-enforcement/> (last visited Aug. 29, 2019); Mem. from Donald F. McGahn II, Counsel to the President, re: Communications Restrictions with Personnel at the Department of Justice (Jan. 27, 2017), available at <https://www.politico.com/f/?id=0000015a-dde8-d23c-a7ff-dfe4d530000>.

⁸ See, e.g., Adam Goldman, *Andrew McCabe, F.B.I.’s Embattled Deputy, Is Expected to Retire*, N.Y. Times, Dec. 23, 2017, <https://www.nytimes.com/2017/12/23/us/politics/mccabe-fbi-trump-russia.html>; Jenna Johnson & William Branigin, *Trump Renews Twitter Attacks on Attorney General Jeff Sessions*, Wash. Post, July 25, 2017, https://www.washingtonpost.com/politics/trump-renews-twitter-attacks-on-attorney-general-jeff-sessions/2017/07/25/003d15ca-7124-11e7-8839-ec48ec4cae25_story.html; Kyle Cheney, *Andrew McCabe Sues DOJ, Claims His Firing Was ‘Retaliation’ Directed By Trump*, POLITICO (Aug. 8, 2019), <https://www.politico.com/story/2019/08/08/andrew-mccabe-sues-doj-fbi-1453351>; Matt Zaposky, *Justice Dept. Could Be Nearing Decision on Whether To Charge Andrew McCabe*, Wash. Post, Aug. 26, 2019, https://www.washingtonpost.com/national-security/justice-dept-could-be-nearing-decision-on-whether-to-charge-andrew-mccabe/2019/08/26/0e1a636c-c840-11e9-a1fe-ca46e8d573c0_story.html; Quinta Jurecic, *Will Trump Succeed in Prosecuting Andrew McCabe?*, N.Y. Times: Op-Ed, Aug. 28, 2019, <https://www.nytimes.com/2019/08/28/opinion/andrew-mccabe-trump-fbi.html>. See also *supra* note 2.

(D.D.C. 2017) (alteration omitted). Information dissemination, however, need not be the requester’s sole occupation. *Id.* Disseminating newsworthy information and analysis to the public is our main activity.

Ben Wittes is the co-founder and editor-in-chief of *Lawfare*, an online publication dedicated to analyzing how actions taken or contemplated to protect the nation interact with the nation’s laws and legal institutions.⁹ He has more than 20 years of experience studying issues of U.S. national security law and policy as a journalist, scholar, writer, and public commentator. Scott R. Anderson, is a Senior Editor for *Lawfare*, where he has both authored and edited dozens of pieces,¹⁰ as well as a Fellow in Governance Studies at the Brookings Institution. Through their work at *Lawfare* and elsewhere, both Wittes and Anderson qualify as being primarily engaged in disseminating information to the public.

Protect Democracy also qualifies as being primarily engaged in disseminating newsworthy information. It intends to disseminate the information obtained; it furthers its core mission by informing public understanding of the operations and activities of government, including by gathering and disseminating information that is likely to contribute significantly to the public understanding of the independence of the Department of Justice from political interference; and it intends to give the public access to documents transmitted via FOIA on its website. For these reasons, Protect Democracy also qualifies as being primarily engaged in disseminating newsworthy information. *Protect Democracy Project, Inc.*, 263 F. Supp. 3d at 298.

This request is accordingly entitled to expedited processing under 28 C.F.R. § 16.5(e)(ii) and 5 U.S.C. § 552(a)(6)(E)(v)(II).

2. *There exist possible questions about the government’s integrity that affect public confidence*

This request is also entitled to expedited processing because it concerns a matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity that affect public confidence. 28 C.F.R. § 16.5(e)(iv).

As noted above, President Trump’s public attacks on McCabe and the government’s investigation of McCabe are the subject of widespread and exceptional media interest.¹¹

The White House’s involvement in specific-party enforcement matters implicates integrity issues of the highest order. The Constitution’s Take Care, Due Process, and Equal Protection Clauses, along with the First Amendment, limit the White House’s ability to influence or interfere with specific prosecutions.¹² In addition, the White House’s interference in specific

⁹ See *About Lawfare: A Brief History of the Term and the Site*, Lawfare, <https://www.lawfareblog.com/about-lawfare-brief-history-term-and-site> (last visited Aug. 29, 2019).

¹⁰ See Scott Anderson, Lawfare, <https://www.lawfareblog.com/contributors/sanderson> (last visited Aug. 31, 2019).

¹¹ See *supra* note 23.

¹² See Protect Democracy, *No “Absolute Right” to Control DOJ: Constitutional Limits on White House Interference with Law Enforcement Matters* (Mar. 2018), <https://protectdemocracy.org/resource-library/document/no-absolute-right-control-doj/>.

prosecutions renders prosecutors conflicted, dividing their loyalties between the neutral pursuit of justice and the White House’s own aims. It “calls into question the objectivity of those charged with bringing a defendant to judgment,” and “creates an appearance of impropriety that diminishes faith in the fairness of the criminal justice system in general.”¹³

Here, as explained above, President Trump’s sustained attacks on McCabe, coupled with the lack of public evidence supporting criminal charges, gives rise to serious questions about the possibility of improper interference in DOJ’s investigation and potential prosecution of McCabe.¹⁴ It creates an appearance of impropriety that diminishes public confidence in the fairness of the investigation into McCabe¹⁵ and the criminal justice system more broadly.

For these reasons, this request is also entitled to expedited processing under 28 C.F.R. § 16.5(e)(iv).

Request for Fee Waiver

We request that all fees be waived pursuant to 5 U.S.C. § 552(a)(4)(A)(ii)–(iii) and 28 C.F.R. § 16.10(k). FOIA requires that fees be waived if records are requested by “a representative of the news media” and “disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester and is not primarily in the commercial interest of the requester.” 5 U.S.C. § 552(a)(4)(A)(ii)–(iii). FOIA clarifies that “a representative of the news media” “means any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience.” *Id.* § 552(a)(4)(A)(ii). And DOJ’s implementing regulations specify that information is likely to contribute significantly to public understanding where disclosure is “meaningfully informative about government operations or activities” and will “contribute to the understanding of a reasonably broad audience of persons interested in the subject.” 28 C.F.R. § 16.10(k)(2)(ii).

We have no commercial interest in this request. Ben Wittes and Scott R. Anderson are representatives of the news media. As noted above, Wittes and Anderson are primarily engaged in editing and publishing pieces providing reporting, opinions, and analysis of newsworthy legal developments. *See supra* at p. 4 & nn.9–10. As such, Wittes and Anderson “gather[] information of potential interest to a segment of the public, us[e] their] editorial skills to turn the raw materials into a distinct work, and distribute[] that work to an audience.” 5 U.S.C. § 552(a)(4)(A)(ii).

In addition, the disclosure of the requested records will be meaningfully informative about the operations and activities of the DOJ, President Trump, and the White House, and will contribute to the understanding of a reasonably broad audience of persons interested in the subject. *See supra* pp. 2–5. The records will be meaningfully informative as the responsive records we are requesting will reveal the degree of potentially inappropriate executive branch

¹³ *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 810–11 (1987).

¹⁴ See Benjamin Wittes, *Thoughts on the Impending Prosecution of Andrew McCabe*, Lawfare (Aug. 27, 2019), <https://www.lawfareblog.com/thoughts-impending-prosecution-andrew-mccabe>.

¹⁵ See *id.*; Quinta Jurecic, *Will Trump Succeed in Prosecuting Andrew McCabe?*, N.Y. Times: Op-Ed, Aug. 28, 2019, <https://www.nytimes.com/2019/08/28/opinion/andrew-mccabe-trump-fbi.html>.

involvement in a high-profile criminal prosecution of a former senior FBI official. See 28 C.F.R. § 16.10(k)(2)(ii)(A). And disclosure of the records must be presumed to contribute to the understanding of a reasonably broad audience, as Wittes and Anderson are representatives of the news media. *Id.* § 16.10(k)(2)(ii)(B).

* * *

Thank you for your attention to our request. We expect to receive a determination on expedited processing within 10 calendar days. 5 U.S.C. § 552(a)(6)(E)(ii)(I); 28 C.F.R. § 16.5(e)(4). We would be happy to discuss its terms with you over the phone or via email to clarify any aspect of the request or, where reasonable, to narrow the request.

Sincerely,

Benjamin Wittes
Editor in Chief, *Lawfare*
1775 Massachusetts Ave. NW
Washington, D.C. 20036
Phone: (202) 797-4368
Email: benjamin.wittes@gmail.com

Scott R. Anderson
Fellow in Governance Studies at the Brookings
Institution
Senior Editor, *Lawfare*
Phone: 202-797-2480
Email: scott.anderson@lawfareblog.com

John Langford
The Protect Democracy Project, Inc.
555 W. 5th Street
Los Angeles, CA 90013
Email: john.langford@protectdemocracy.org
Phone: (919) 619-9819

Deana K. El-Mallawany
The Protect Democracy Project, Inc.
15 Main Street, Ste. 312
Watertown, MA 02472
Phone: (202) 579-4582
Email: deana.elmallawany@protectdemocracy.org